IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 6, 2006

# STATE OF TENNESSEE v. VINCENT CONNER

**Direct Appeal from the Circuit Court for Maury County**
**Nos. 14240,14101,13623 Stella Hargrove, Judge**

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**No. M2005-00887-CCA-R3-CD - Filed August 23, 2006**

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This is a direct appeal from convictions on a jury verdict of possession of .5 grams or more of cocaine with intent to sell and misdemeanor evading arrest. The Defendant, Vincent Conner, was sentenced to twelve years as a Range II, multiple offender for these convictions, with service consecutive to a prior five-year sentence, resulting in an aggregate sentence of seventeen years under the supervision of the Tennessee Department of Correction. The Defendant raises two issues on appeal: (1) this Court should, in the interest of justice, waive the requirement of a timely filed notice of appeal, and (2) the evidence is insufficient to support his convictions. We reverse and dismiss the Defendant's evading arrest conviction but otherwise affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Reversed in Part**

DAVID H. WELLES, J., delivered the opinion of the court, in which J.C. MCLIN, J. joined. GARY R. WADE, P.J., not participating.

John P. Cauley, Franklin, Tennessee, for the appellant, Vincent Conner.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; and Mike Bottoms, District Attorney General, for the appellee, State of Tennessee.

## OPINION

### FACTS

In the early morning hours of July 24, 2003, the Defendant was approached by law enforcement officers as he stood in the front yard of an unoccupied house in Mt. Pleasant. When the officers approached, the Defendant fled. The Defendant was apprehended and arrested, and a plastic bag containing cocaine was later discovered several feet from where the Defendant was apprehended. The Defendant was indicted by a Maury County grand jury on possession of .5 grams or more of cocaine with intent to sell, see Tenn. Code Ann. § 39-17-417(a)(4), and evading arrest, see id. § 39-16-603(a)(1)(A).

The Defendant was tried by a jury. At trial, Officer Terry Evenstein of the Maury County Sheriff's Office testified that on the morning in question he met with Officer Brian Gray of the Mt. Pleasant Police Department and learned that Officer Gray knew the whereabouts of the Defendant. Remembering that he had papers to serve on the Defendant, Officer Evenstein, along with Officer Gray, drove to the location where the Defendant was last seen. Officer Evenstein stated that as he and Officer Gray, who were both in uniform and driving clearly marked patrol cars, approached an abandoned house on Broadway, he observed "seven or eight people out there, standing around." As soon as Officer Evenstein made eye-contact with the Defendant, the Defendant "took off running." Officer Evenstein testified that he yelled "stop, several times." Officer Evenstein also stated that the street was well lit and the Defendant was the only one in the group to run.

Officer Evenstein testified that the Defendant ran between two houses toward the back yard. Officer Evenstein gave chase and shortly thereafter apprehended the Defendant. Officer Evenstein called for Officer Gray to assist, and Officer Gray arrived moments later. The Defendant was placed under arrest, handcuffed, and escorted back to Officer Gray's police car. Officer Evenstein estimated that only one minute elapsed between the time the Defendant fled and the time he was apprehended; the spot where the Defendant was apprehended was only thirty to forty feet from the two patrol cars; and the spot where the Defendant was apprehended was within sight of the location of the patrol cars.

As the Defendant was escorted back to Officer Gray's patrol car, the Defendant asked and was allowed to give "a large amount of cash" to a bystander, Mr. Antonio Marlow. Officer Evenstein then returned to the arrest scene to "look for anything that was dropped." Officer Evenstein stated that it was standard procedure to retrace the route of a subject's flight and look for dropped items. Officer Evenstein testified that he found "a plastic bag with a powdery substance in it" and further described the powder as white. The bag was found "two or three foot [sic], maybe, -- it wasn't very far -- if that," from the spot where the Defendant was arrested. Officer Evenstein stated that the grass was covered with dew and wet, but the top of the plastic bag was dry. Officer Evenstein further testified that no one else was near the arrest scene between the time the Defendant was escorted to the patrol car and when the two officers returned to look for dropped items.

On cross-examination, Officer Evenstein admitted that he did not know the exact amount of money he witnessed the Defendant give to Mr. Marlow. Officer Evenstein also stated that it was common for people to "hang out" in the area in which the Defendant was seen and apprehended; that it was an area known for drug activity; and that he had previously taken part in several drug-related arrests in this same area. Officer Evenstein further admitted that he never witnessed the Defendant with the bag nor had he been in the area where the bag was found immediately prior to his encounter with the Defendant.

Officer Brian Gray of the Mt. Pleasant Police Department gave testimony at trial consistent with Officer Evenstein's statements. Officer Gray stated that at approximately 1:00 a.m. the morning of July 24, 2003, he and Officer Evenstein drove up to a group of seven or eight people, saw the Defendant, and when the Defendant observed them, he fled. In an effort to cut off the Defendant,

Officer Gray ran into a vacant house believing he could exit through the back. While in the house he received a radio call from Officer Evenstein, who stated that he had caught the Defendant and requested assistance placing him under arrest.

Officer Gray stated that the Defendant was the only one in the group to run, and he did so before Officer Gray had a chance to yell "stop." After the Defendant was in custody and as he was escorted to the police car, Officer Gray, at the request of the Defendant, took "a pretty good stack of money" from the Defendant's pocket and gave it to Mr. Marlow. At this time, the Defendant was not under arrest for drug possession as the bag containing cocaine had not yet been discovered.[1] No drug paraphernalia was found on the Defendant.

Officer Gray estimated that it took less than a minute to walk the Defendant from where he was arrested to the patrol car and that it took the two officers no longer than three minutes from the time of the arrest until their return to the arrest scene to conduct a search. Officer Gray testified that he found the plastic bag two feet from the place where the Defendant was arrested. The plastic bag contained both "rocks" and a white powder substance. While the bottom of the bag was wet where it had come in contact with the ground, the top was dry. Officer Gray placed this bag into an evidence bag and sealed it. After discovery of the drugs, Officer Gray asked Mr. Marlow to turn over the Defendant's cash. However, Mr. Marlow returned only $148, which Officer Gray stated "wasn't close to the stack that I handed him to begin with." Officer Gray sent the plastic bag containing the powder substance to the Tennessee Bureau of Investigation (TBI) crime lab for analysis and fingerprinting.

On cross-examination, Officer Gray admitted that he never saw the Defendant with the plastic bag nor did he see the Defendant drop the bag. Officer Gray also admitted that he knew from his professional experience that the area in which the Defendant was arrested was known for drug activity.

Mr. Brett Trotter, a forensic scientist with the TBI's Nashville Crime Lab, testified that the white powder substance and rocks in the plastic bag submitted to his lab for testing weighed 4.6 grams and contained "cocaine base." Mr. Trotter also noted that he was unable to get any fingerprints from the plastic bag. Tommy Goetz, a Criminal Investigator with the Mt. Pleasant Police Department, stated that he had been a police officer for twenty-four years, had worked narcotics cases since 1987, and had attended in excess of 300 special classes or seminars on law enforcement and narcotics in his career. Investigator Goetz testified that six or less rocks of cocaine usually indicates a casual user while more than six is likely a drug dealer. Investigator Goetz also stated that it is not uncommon that forensic scientists are unable to obtain prints from plastic bags.

[1] Officer Gray stated he would have confiscated the cash as evidence if he had known of the drugs at the time.

On cross-examination, Investigator Goetz admitted that it was possible that someone with more than six rocks of cocaine would be a user and not a seller. However, the amount of drugs the Defendant was found with, estimated at seventy rocks, would lead him to "automatically" conclude that the Defendant was a seller and not a user.

The defense called Mr. Antonio Marlow as its only witness. Mr. Marlow testified that he never saw the Defendant take off running and that he gave all of the cash back to Officer Gray. On cross-examination, Mr. Marlow admitted he had two possession of cocaine with intent to sell charges pending and was currently in jail on yet another offense. At the conclusion of the trial, the Defendant was convicted of both possession with intent to sell and evading arrest.

In December of 2004, the Defendant received a combined plea and sentencing hearing, at which he pled guilty to several other drug related crimes and probation violations resulting in a five-year sentence. The Defendant was also sentenced to twelve years for the two convictions at issue in this case; twelve years for the drug conviction and a concurrent sentence of eleven months and twenty-nine days for the misdemeanor evading arrest conviction. The Defendant was ordered to serve his five-year and twelve-year sentences consecutively for a total of seventeen years in the custody of the Department of Correction. Four months after the judgments of conviction were entered, in April of 2005, the trial court entered an order granting the Defendant's request for a delayed appeal, noting that the Defendant's counsel had failed to advise the Defendant of his right to appeal. The Defendant filed a notice of appeal with this Court on April 11, 2005.

## ANALYSIS

The Defendant raises two issues on appeal: first, that justice requires this Court to waive the requirement of a timely filing of the notice of appeal, and second, that there was insufficient evidence to convict him of the crimes of possession with intent to sell and evading arrest. We agree that, in the interest of justice, the Defendant's appeal should not be deemed waived for failure to timely file a notice of appeal. We also agree that the evidence was insufficient to support the finding of all the elements of evading arrest beyond a reasonable doubt but conclude that there is sufficient evidence to support his conviction for possession of cocaine with intent to sell.

### I. Notice of Appeal

In his first claim on appeal, the Defendant argues that this Court should waive the timely filing of the notice of appeal in the interest of justice. In this case, the judgments of conviction were issued against the Defendant on December 21, 2004, and a notice of appeal was filed on April 11, 2005. In order to be timely filed, a notice of appeal must be filed within thirty days of the entry of the trial court judgment. See Tenn. R. App. P. 4(a). However, "[n]otwithstanding any other provision of law or rule of court to the contrary, in all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interests of justice." Tenn. Code Ann. § 27-1-123; see also Tenn. R. App. P. 4. In this case, the record indicates that the

Defendant's counsel failed to inform him of his right to appeal his convictions.[2] Accordingly, in the interest of justice, we will consider the Defendant's appeal.

## II. Sufficiency of the Evidence

In his second issue on appeal, the Defendant claims the evidence presented at trial was insufficient to convict him of possession of cocaine with intent to sell and evading arrest. We disagree with his claim as to the possession conviction but agree that there is insufficient evidence to support his evading arrest conviction.

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

### A. Possession with intent to sell

The Defendant claims that there was insufficient evidence for a reasonable trier of fact to find beyond a reasonable doubt that he was guilty of possession of cocaine with the intent to sell. To support this claim, the Defendant argues that he was not found in direct possession of the cocaine and his mere proximity to the drugs found on the ground near where he was arrested does not support

[2] The technical record reveals that the Defendant filed a request for a delayed appeal with the trial court on April 11, 2005. On April 14, 2005, the trial court issued an order allowing the Defendant to file a delayed appeal. The Defendant should have "filed a motion with this Court requesting the timely filing of a notice of appeal be waived in the interest of justice." State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989).

constructive possession. The Defendant further argues that "the evidence of his guilt was entirely circumstantial," that neither officer that testified against him actually saw him in possession of the drugs or witnessed him drop the drugs, and the officers failed to "secure the area of the arrest" prior to their return and discovery of the drugs. Thus, the Defendant argues, the facts of this case are not "so closely interwoven and connected that the finger of guilt is pointed unerringly at the defendant and the defendant alone." quoting State v. Crawford, 470 S.W.2d 610, 613 (Tenn. 1971).

In order to convict the Defendant of possession of cocaine with intent to sell, the State was required to prove beyond a reasonable doubt that the Defendant: (1) knowingly possessed a substance containing cocaine, (2) with the intent to sell and (3) the amount was .5 grams or more. See Tenn Code Ann. § 39-17-417(a)(4) and (c)(1). The Defendant has not challenged whether the substance found was cocaine, nor whether the weight of the illegal substance met the requisite elements of the crime for which he was convicted. It is also unclear from his brief whether the Defendant challenges the jury's conclusion that the drugs were possessed with the intent to sell. The only issue clearly challenged in the Defendant's appellate brief is whether there was sufficient evidence to conclude the Defendant possessed the illegal substance discovered at the scene of his arrest.

Tennessee courts have recognized that possession of drugs may be actual or constructive. State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001) (citing State v. Patterson 966 S.W.2d 435, 444-45 (Tenn. Crim. App. 1997)). The effect of finding constructive possession is essentially "the ability to reduce an object to actual possession." State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). Constructive possession occurs when a person has "the power and intention at a given time to exercise dominion and control over [the drugs] either directly or through others." Shaw, 37 S.W.3d at 903 (quoting Patterson, 966 S.W.2d at 445). However, "[o]ne's mere presence in an area where drugs are discovered, or one's mere association with a person who is in possession of drugs, is not alone sufficient to support a finding of constructive possession." Shaw, 37 S.W.3d at 903 (citing Patterson, 966 S.W.2d at 445; Cooper, 736 S.W.2d at 129). See also State v. Bigsby, 40 S.W.3d 87, 90 (Tenn. Crim. App. 2000).

Additionally, "circumstantial evidence alone may be sufficient to support a conviction." Bigsby, 40 S.W.3d at 90. However, for a conviction based solely on circumstantial evidence to stand, such evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with innocense and must exclude every other reasonable theory or hypothesis except that of guilt." Id. Furthermore, "'it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime.'" Id. (quoting Pruitt v. State, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970)).

In determining whether the possession of a controlled substance was intended for sale, this Court looks to the entirety of the circumstances surrounding the possession of the drugs. We have previously determined that a large amount of cash found in conjunction with cocaine amounted to sufficient evidence of intent to sell. See State v. Logan, 973 S.W.2d 279, 281 (Tenn. Crim. App. 1998). We have also found that possession of a large amount of drugs and the absence of any drug

paraphernalia or apparatus indicative of personal use is also sufficient to support a conviction for possession of a controlled substance with intent to sell or deliver. See State v. Chearis, 995 S.W.2d 641, 645 (Tenn. Crim. App. 1999) (holding that 1.7 grams of crack cocaine was a sufficiently large amount to infer intent to sell). Moreover, the Tennessee criminal statutes expressly allow a jury to infer intent to sell based on the amount of the controlled substance possessed and the "relevant facts" surrounding the arrest. See Tenn. Code Ann. § 39-17-419.[3]

In our view, the evidence presented at trial was legally sufficient to support the Defendant's conviction for possession of cocaine with intent to sell. Both Officer Evenstein and Officer Gray testified that when they approached the Defendant, he ran; only minutes after his apprehension, a search of the location where the Defendant was arrested yielded a bag containing 4.6 grams of cocaine. No other people were present at the point of arrest between the time the Defendant was arrested and the drugs were discovered. The bag was wet on the bottom where it was in contact with the dew-covered ground, but the top of the bag was dry. The Defendant was found with a large amount of cash. The Defendant was not found to be in possession of any drug paraphernalia that would indicate he was merely a user.

Based on this evidence, the jury could have rationally concluded that the bag containing the cocaine belonged to the Defendant and was abandoned only a few feet from where he was caught by law enforcement officers. Accordingly, the evidence supports the jury's conclusion that the Defendant had possession of the cocaine. See Shaw, 37 S.W.3d at 903. The jury could further rationally conclude, based on the large amount of cash found on the Defendant, the large amount of drugs, and the fact that no drug paraphernalia was found on the Defendant, that the Defendant intended to sell the illegal substance. See Tenn. Code Ann. § 39-17-419. Accordingly, we find the evidence presented to the jury was sufficient to support the Defendant's conviction for possession of .5 grams or more of cocaine with the intent to sell. This issue has no merit.

**B. Evading Arrest**

The Defendant also claims the evidence was insufficient as a matter of law to convict him of evading arrest. To support this claim the Defendant argues that the evidence demonstrates that the officers' intent was only to serve papers, not to arrest the Defendant. Furthermore, the Defendant asserts that because the he did not know the officers were attempting to arrest him, his flight was not evading arrest as defined in our criminal statutes. The State agrees that the proof showed that the officers approached the Defendant to "serve papers" on him, not to arrest him. The State argues in its appellate brief that when Officer Evenstein "yelled several times for the Defendant to stop" and gave chase, it became "abundantly clear that the police officers were attempting to arrest the Defendant." We disagree with the State's argument.

[3] "It may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing" Tenn. Code Ann. § 39-17-419.

The evading arrest statute states, in relevant part: "it is unlawful for any person to intentionally flee by any means of locomotion from anyone the person knows to be a law enforcement officer if the person: [k]nows the officer is attempting to arrest the person[.]" Tenn. Code Ann. § 39-16-603(a)(1)(A). Thus, it is an element of the offense that a Defendant "[k]nows the officer is attempting to arrest" the person at the time the person flees.[4] Id. This Court has previously held that a conviction for evading arrest cannot stand where the arresting officer lacks probable cause at the time he pursued the defendant. See State v. Holbrooks, 983 S.W.2d 697, 703 (Tenn. Crim. App. 1998). Moreover, if an officer is intent on arresting a defendant based not upon witnessing unlawful action but rather pursuant to an arrest warrant, the attempt to arrest must have begun before the defendant flees in order to support a conviction for evading arrest. See State v. Lewis, 978 S.W.2d 558, 563 (Tenn. Crim. App. 1997) (finding that the officer "had not yet begun his attempt to arrest" the defendants before they fled, and therefore, the evading arrest convictions were reversed).

Based on the record before this Court, we cannot conclude that any rational trier of fact could have found beyond a reasonable doubt the essential element that the Defendant knew the officers were attempting to arrest him when he fled. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). The Defendant ran as soon as the officers approached a large group, of which he was but one member. There is no evidence that the officers witnessed the Defendant engage in any unlawful activity that would have supported an arrest when they first approached the Defendant. See Holbrooks, 983 S.W.2d at 703. While Officer Evenstein yelled for the Defendant to stop, neither officer stated that he was attempting to arrest the Defendant. See Deadrick M. Pigg v. State, No. M2000-03233-CCA-R3-CD, 2002 WL 1585636, at *3 (Tenn. Crim. App., Nashville, July 18, 2002) (upholding an evading arrest conviction where the police communicated: "You are under arrest."). Officer Evenstein testified that "there was papers that had to be served" on the Defendant, but because no announcement was made by the officers, the Defendant may just as well have assumed the Deputy Sheriff was intent on serving him with a summons in civil matter or questioning him about something, which could also explain his flight.

In short, the record is devoid of any evidence that would lead a rational trier of fact to conclude that the Defendant knew the officers were attempting to arrest him at the moment he fled. See State v. Black, 924 S.W.2d 912, 915 (Tenn. Crim. App. 1995) (the record revealed that the defendant was told he was under arrest and the defendant admitted at trial that he knew when he was told to put his hands on the hood of the car that he was "going to be arrested."); State v. James A. McCurry, No. W2002-02870-CCA-R3-CD, 2003 WL 22848975, at *3 (Tenn. Crim. App., Jackson, Nov. 26, 2003) (the defendant testified at trial that he knew he had an outstanding arrest warrant

[4] We note that the same statute also provides for a separate "mode" of evading arrest, of flight while "operating a motor vehicle[.]" Tenn. Code Ann. § 39-16-603(b)(1). This Court has previously highlighted a crucial distinction between the two modes, see, e.g., State v. Thaddaeus Medford, No. W2002-00226-CCA-R3-CD, 2003 WL 22446575 (Tenn. Crim. App., Jackson, Oct. 21, 2003), by pointing out that evading arrest pursuant to subsection (a)(1) requires a defendant flee after he or she "knows the officer is attempting to arrest" them, while evading arrest in a motor vehicle pursuant to subsection (b)(1) requires only the lesser burden of a flight "after having received any signal from such officer to bring the vehicle to a stop." Tenn. Code Ann. § 39-16-603 (emphasis added).

when he fled from officers). In the light most favorable to the State, we cannot conclude that sufficient evidence was presented at trial to support the element that the Defendant knew the officers were attempting to arrest him when he fled. Accordingly, the conviction of evading arrest must be reversed and dismissed.

## CONCLUSION

Based on the foregoing reasoning and authorities, the Defendant's conviction for evading arrest is reversed and dismissed. The judgments of the trial court are affirmed in all other respects.

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DAVID H. WELLES, JUDGE